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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. [redacted] 37

CALMAR, INC.,
Petitioner,

vs.

COOK CHEMICAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 778

CALMAR, INC.,
Petitioner,

vs.

COOK CHEMICAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

Certiorari having been granted in *Graham* v. *John Deere Co.*, No. 580, other petitioners, particularly petitioner Calmar, Inc. here and the petitioner in *United States of America* v. *Bert N. Adams*, No. 906, are trying to persuade the Court that certiorari should be granted in their cases also, on the ground that their cases should be combined for consideration along with *Graham*. All three cases are said by petitioner here, and by the Solicitor General in the *Adams* petition, to involve the standard of invention under 35 U.S.C. §103.

Respondent protests petitioner's attempt to persuade the Court to grant certiorari here in order to consolidate

this case, so to speak, for consideration with *Graham*, for the following reasons:

1. The major legal question in the "standard of invention" area is the effect of Section 103 of the Patent Code on the previously-existing standard of invention, as enunciated in the controlling decisions of this Court, particularly *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84 (1941) and *Great Atlantic and Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950). As is fully argued under point I in our Brief in Opposition, at page 9, *this* case does *not* present that question. The Eighth Circuit has consistently held, and it held in this case, that this Court's landmark *Cuno* and *A & P* decisions remain the controlling authorities. *If* that ruling was erroneous, the error favored the petitioner here, not respondent.

2. The *Graham* case exemplifies a conflict between decisions of the Eighth and Fifth Circuits as to the validity of the same patent. The Fifth Circuit twice held it valid. Later, in *Graham*, the Eighth Circuit held it invalid for lack of invention. There could scarcely be a more vivid concrete illustration than *Graham* of the strict attitude of the Eighth Circuit toward combination patents. That strict attitude is also illustrated by the recent statistical record of the Eighth Circuit, compared with others of the Courts of Appeals, which is referred to in our Brief in Opposition at page 13, note 6. The Eighth Circuit is decidedly *not* subject to being charged generally with being too loose on the question of patentability.

3. All that is really involved in this case is the petitioners' contention that, although they concede that the Eighth Circuit generally enunciates a legally correct standard of invention, and that it did so here, nevertheless the Eighth Circuit here misapplied the standard. We have argued to the contrary under Point II of the Brief in Opposition, at page 13. What is important at this stage, how-

ever, is that no other case—*Graham*, *Adams*, or any further ones in which petitions may be later filed, may fruitfully be combined with this one. Where the application of a concedly correct legal test to the facts and circumstances of a particular case is the issue, then each tub must of necessity stand on its own bottom.

CONCLUSION

The grant of certiorari in the *Graham* case furnishes no reason for granting certiorari here. *Graham* presents a conflict between circuits as to the proper legal standard of patentability—no such point is involved here, nor does this case involve conflicting decisions. It is not the purpose of certiorari merely to provide dissatisfied litigants with a second appellate review of the facts, such as is sought by the petitioners in this case, and furthermore absolutely no purpose could be served by combining several cases of that kind for review, since such cases imperatively demand an intensely individualized treatment. For the reasons set forth here and in our Brief in Opposition, the Petition for Certiorari should be denied.

Respectfully submitted,

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